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Nos. 06-71 and 06-79

In the Supreme Court of the United States

DANTONE, INC., T/A CARRIAGE TRADE AUTO AUCTION, PETITIONER

v.

UNITED STATES OF AMERICA

PAUL J. LEAHY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court correctly instructed the jury on the intent required for bank fraud under 18 U.S.C. 1344.

2. Whether the orders of criminal forfeiture in this case violated petitioners' Sixth Amendment right to a jury trial.

3. Whether the orders of restitution in this case violated petitioners' Sixth Amendment right to a jury trial.

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OPINIONS BELOW

The en banc opinion of the court of appeals (Pet. App. 1a-50a) is reported at 438 F.3d 328.[1] The panel opinion of the court of appeals (Pet. App. 51a-124a) is reported

[1] Petitioners' appendices appear to be identical. Unless otherwise indicated, all references to "Pet. App." will be to the appendix in No. 06-71.

at 445 F.3d 634. The order amending opinion (Pet. App. 123a-124a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 127a-128a) was entered March 24, 2006. (An earlier judgment of the court of appeals (Pet. App. 129a-131a), which was entered on February 15, 2006, was vacated on May 1, 2006 (Pet. App. 132a-133a).) A petition for rehearing in No. 06-71 was denied on April 20, 2006 (Pet. App. 125a-126a). A petition for rehearing in No. 06-79 was denied on April 20, 2006. On May 8, 2006, Justice Souter extended the time within which to file a petition for a writ of certiorari in No. 06-71 to and including July 15, 2006, and both petitions were filed on July 14, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner Dantone, Inc., and its two senior managers, Timothy Smith and petitioner Leahy, were found guilty on ten counts of bank fraud, in violation of 18 U.S.C. 1344. Pet. App. 5a, 53a. Petitioner Dantone was sentenced to five years of probation and a fine of $800,000. *Id.* at 60a. Petitioner Leahy was sentenced to a term of 37 months of imprisonment, to be followed by five years of supervised release, and was fined $5000. *Ibid.* The district court entered orders of forfeiture in the sum of $418,657 and restitution in the sum of $408,970, for which petitioners and Smith were jointly and severally liable. *Id.* at 6a.

1. Petitioner Dantone is a privately owned corporation that owns and operates an automobile auction in

Conshohocken, Pennsylvania, known as Carriage Trade Auto Auction (Carriage Trade). Pet. App. 55a. During the relevant time period, Smith was the general manager of Carriage Trade, and petitioner Leahy was the assistant manager or operations manager. *Ibid.*

Between approximately 1993 and 1996, ten banks retained petitioners and Smith to auction automobiles and to remit the auction proceeds, less fees and expenses, to the banks. Pet. App. 55a. Pursuant to their agreements with petitioner Dantone, the banks consigned repossessed automobiles, or cars returned at the expiration of lease agreements, to Carriage Trade to be auctioned to the highest bidder. *Id.* at 55a-56a. Most of the banks set minimum prices for the auction of each vehicle. *Id.* at 56a.

With respect to at least 311 automobiles, petitioners and Smith falsely represented to the banks that they had auctioned the vehicles. Pet. App. 56a-57a. In fact, petitioners had sold the cars for higher prices than the "auction" prices that they reported to the banks and pocketed the difference between the true sales prices and the fictional auction prices. *Ibid.* In limited instances, petitioners repaired or reconditioned the automobiles before reselling them. *Id.* at 56a. When the banks received checks from Carriage Trade for the vehicles, the banks either assumed or were told that the checks represented the price of the highest auction bid, minus fees and expenses. *Ibid.*

2. On May 15, 2001, a federal grand jury indicted petitioners and Smith on ten counts of bank fraud, in violation of 18 U.S.C. 1344. Pet. App. 54a-55a. The indictment contained a notice of forfeiture for $418,657, the difference between the false sales prices that petitioners and Smith had reported to the banks and the

amounts that petitioners actually obtained when they sold the cars in question. Indictment 6-7; Gov't C.A. Br. 6.

3. At trial, the government introduced the testimony of bank representatives and Carriage Trade employees, as well as the true and false bills of sale and accompanying paperwork for each of the 311 fraudulently sold automobiles. Pet. App. 57a. The jury found petitioners and Smith guilty on all counts. *Id.* at 58a.

Petitioners were sentenced pursuant to Sentencing Guidelines § 2F1.1 (2000), which applied to frauds committed before 2001. Pet. App. 58a.[2] Following an evidentiary hearing, the district court calculated the loss to the banks as $408,970, which represented the $418,657 difference between the true and false sales prices, minus a $5000 reimbursement payment made by Carriage Trade to one of the banks, and minus $4687 in repairs and enhancement that petitioners made to some of the 311 cars. *Id.* at 58a-59a. The district court also entered an order of forfeiture of $418,657, finding by a preponderance of the evidence that that amount constituted the proceeds that petitioners had obtained as a result of their fraudulent conduct. *Ibid.*

4. On appeal, petitioners contended, *inter alia*, that the district court's jury instructions on the elements of bank fraud were erroneous under *United States* v. *Thomas*, 315 F.3d 190 (3d Cir. 2002). See Pet. App. 62a-63a. Petitioners maintained that the instructions erroneously rested on a disjunctive reading of Section 1344(1) and (2), and that the instructions erroneously

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[2] Sentencing Guidelines § 2F1.1 was deleted in the 2001 edition of the Sentencing Guidelines, and the sentences for frauds were instead addressed by Sentencing Guidelines § 2B1.1.

described Section 1344's intent requirement. *Id.* at 63a.[3] A panel of the court of appeals rejected those arguments. *Id.* at 62a-81a.

Relying on *Thomas*, the panel majority observed that Section 1344 "must be read in the conjunctive, [such] that the intent to defraud the bank element of § 1344(1) must apply to § 1344(2) as well." Pet. App. 63a. The majority concluded, however, that the district court's instructions "did not rest on an erroneous disjunctive reading of § 1344." *Id.* at 64a. Rather, the majority concluded that the district court properly instructed the jury "that guilt under § 1344 depended on a finding that [petitioners and Smith] had the requisite intent to defraud the banks," *id.* at 67a, emphasizing that the district court had instructed the jury that "[t]he intent element of bank fraud is an intent to deceive the bank in order to obtain from it money or other property." *Id.* at 66a (emphasis omitted) (quoting jury instructions).

The panel majority rejected petitioners' argument that Section 1344 "requires not only proof of an intent to defraud the bank, but also an intent to harm the bank." Pet. App. 68a. Relying on *United States* v. *Khorozian*,

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[3] Section 1344 provides in full:

> Whoever knowingly executes, or attempts to execute, a scheme or artifice—
>
> (1) to defraud a financial institution; or
>
> (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;
>
> shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. 1344.

333 F.3d 498 (3d Cir.), cert. denied, 540 U.S. 968 (2003), the majority reasoned that "loss, or risk of loss, goes to the consequences of the fraudulent scheme, and it need not be intended to satisfy § 1344's mens rea requirement of a specific intent to defraud a bank." Pet. App. 71a. The majority explained that the "requirement of an intent to cause loss or liability to the bank" is limited to those situations "where the bank was merely an 'unwitting instrumentality' of the fraud," as opposed to situations in which the bank is the "direct target" of the fraud. *Ibid.* The panel observed that, "where the fraudulent scheme targets the bank, there is no requirement that the defendant *intended* to harm the bank or otherwise intended to cause loss." *Ibid.* Applying those principles here, the panel majority concluded that the jury instructions, taken as a whole, properly instructed the jury that "an intent to defraud the bank had to be found." *Id.* at 75a-76a.

The panel majority also rejected petitioners' claim based on the language in the district court's jury instructions that described "the measure of a fraud" as "whether the scheme shows a departure from moral uprightness, fundamental honesty, fair play and candid dealings in a general light of the community." Pet. App. 77a (emphasis omitted). While acknowledging that "not every departure from moral uprightness and fairness can or will constitute a scheme to defraud" under Section 1344, the panel declined to "look at the challenged instruction in isolation," but instead concluded that "the instructions, taken as a whole, properly instructed the jury as to the proof required to establish a 'scheme to defraud' as well as the appropriate intent to defraud." *Id.* at 80a. Thus, although the panel majority expressed concern about defining fraud "with reference to such

abstract terms as morality and fairness," the court found "no error" in the overall formulation of the fraud instruction. *Id.* at 81a.

The panel unanimously rejected petitioners' argument that the district court abused its discretion in failing to give an instruction that they could not be found guilty if the jury found that they had acted in subjective good faith. Pet. App. 81a-82a; *id.* at 109a (Becker, J., concurring in part and dissenting in part). The panel concluded that the instructions adequately defined Section 1344's intent requirement, "making a good faith instruction unnecessary and redundant." *Id.* at 82a.

The court of appeals panel further unanimously rejected petitioners' claims that there was insufficient evidence to sustain their convictions for bank fraud. Pet. App. 93a; *id.* at 116a (Becker, J., concurring in part and dissenting in part). The court concluded that the evidence supported the finding that petitioners' conduct exposed the banks to a risk of loss by, *inter alia*, "not returning the full sale price of the automobiles to the banks," thereby increasing the deficiencies that the banks had to collect from the banks' debtors. *Id.* at 94a. The court also concluded that there was sufficient evidence to support a finding that petitioners "had an intent to defraud the banks, as opposed to the banks' customers, the debtors on the car loans." *Id.* at 102a.[4]

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[4] Because the Sentencing Guidelines were mandatory at the time of sentencing, the panel unanimously vacated petitioners' sentences and remanded to the district court for further proceedings in light of *United States* v. *Booker*, 543 U.S. 220 (2005). Pet. App. 105a-106a; *id.* at 109a (Becker, J., concurring in part and dissenting in part). Although the panel recognized that, under the earlier en banc decision in this case (see pp. 9-13, *infra*), *Booker* did not render the district court's forfeiture and restitution orders unconstitutional, the panel provided guidance to

The late Judge Becker concurred in part and dissented in part. Pet. App. 109a-122a. Although he "join[ed] the majority's conclusion that the evidence in this case was sufficient to support a conviction" (*id.* at 116a), he would have reversed for jury instruction error. In Judge Becker's view, the district court's instructions lacked "the critical element of bank fraud identified in *Thomas*: namely, that the defendant must have the intent 'to victimize the bank,' * * * either by taking the bank's own funds or by putting the bank at a risk of future loss or liability." *Id.* at 113a (citation omitted). He rejected the majority's conclusion that "proof of an actual intent to cause the bank a loss or risk of loss is not required" in cases in which the bank itself was the target of the defendant's deception. *Id.* at 115a. Under his analysis, *Khorozian* "simply stands for the proposition that the intent to put the bank at a risk of loss is sufficient to violate the bank fraud statute, even if there was no intent to cause an actual loss." *Ibid.* Judge Becker read *Thomas* to hold that "the defendant must *both* target his scheme at the bank and intend to cause the bank a risk of loss." *Id.* at 118a.

Judge Becker also dissented from the majority's discussion of the "moral uprightness" language in the jury instructions. Pet. App. 120a-122a. Unlike the majority, he did not believe that the instructions as a whole cured the inclusion of "the notion of 'moral uprightness'" in the definition of fraud. *Id.* at 122a.

5. Before the panel of the court of appeals issued its decision on the remaining issues in the case, the Third Circuit ordered rehearing en banc in this case (along

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the district court about the calculation of those amounts on remand. *Id.* at 106a-108a.

with two other appeals) to determine whether the district court's "orders of restitution and forfeiture violated defendants' Sixth Amendment right to trial by jury." Pet. App. 5a.

In six separate opinions (Pet. App. 1a-50a), all twelve judges on the en banc court agreed that, notwithstanding *United States* v. *Booker*, 543 U.S. 220 (2005), this Court's decision in *Libretti* v. *United States*, 516 U.S. 29 (1995), which held that the Sixth Amendment's right to a jury trial does not apply to criminal forfeiture, "remains Supreme Court authority by which we are bound." Pet. App. 12a.[5] The lead opinion by Judge Fuentes noted that even though "there may be some tension between *Booker* and *Libretti*," the latter opinion "flatly holds that the Sixth Amendment is not implicated in the forfeiture context." *Id.* at 10a-11a. Thus, the Third Circuit joined "the other Courts of Appeals that have considered this issue," all of which "have reached the same conclusion." *Id.* at 11a. In their concurring opinions, Judge Sloviter and Judge Fisher (joined by Judge Barry) "approve[d] and join[ed]" (*id.* at 25a, 26a) the lead opinion's discussion of the forfeiture issue. The five judges who dissented on the restitution issue likewise joined the majority opinion on the forfeiture question. See *id.* at 27a (lead dissenting opinion by Judge McKee), *id.* at 47a, 49a (opinions of Judges Ambro and Smith, joining Judge McKee's opinion).

A majority of the en banc court further determined that *Booker* does not bar a judge from determining the amount of restitution a defendant must pay under the

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[5] The en banc argument was before fourteen judges. Before issuance of the en banc decision, however, Judge Alito was nominated and confirmed as a Justice of this Court, and Judge Rosenn passed away. See Pet. App. 3a & nn. *, **.

Victim and Witness Protection Act of 1982 (VWPA), 18 U.S.C. 3663, or under the Mandatory Victims Restitution Act of 1996 (MVRA), 18 U.S.C. 3663A-3664. Pet. App. 17a; see *id.* at 25a (Sloviter, J., concurring in judgment); *id.* at 26a (Fisher, J., joined by Barry, J., concurring in judgment). The plurality opinion noted that "[t]he central theme of the *Booker* line of cases has been that facts increasing the maximum penalty for a crime must be either admitted or proven to a jury beyond a reasonable doubt." *Id.* at 17a.[6] Thus, the plurality framed the "key inquiry" as "whether a judge's calculation of the sum a defendant must restore to his or her victim constitutes an increase in punishment exceeding that authorized by plea or jury verdict, in violation of the Sixth Amendment." *Id.* at 19a-20a. The plurality viewed the jury's criminal convictions "as authorizing restitution of a specific sum, namely the 'full amount of each victim's loss,'" with the district court's calculation of that loss as "merely giving definite shape to the restitution penalty born out by the conviction." *Id.* at 21a. The opinion thus concluded that "a restitution order does not punish a defendant beyond the 'statutory maximum' as that term has evolved in the Supreme Court's Sixth Amendment jurisprudence." *Id.* at 20a.

Noting that all the circuits to address the issue had previously held "that *Booker* does not apply to orders of restitution under the MVRA and VWPA" (Pet. App. 22a & n.12), the plurality elaborated that "even though resti-

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[6] Although the court of appeals' judgment on the restitution issue is joined by a majority of the en banc court, the restitution portion of Judge Fuentes' lead opinion, Part IV (Pet. App. 16a-23a), is a plurality opinion. See *id.* at 25a, 26a (Judges Sloviter, Fisher, Barry concurring in the judgment as to Part IV); *id.* at 27a, 47a, 49a (Judges McKee, Rendell, Ambro, Smith, and Becker dissenting as to Part IV).

tution is a criminal punishment," it merely "constitutes a return to the status quo, a fiscal realignment whereby a criminal's ill-gotten gains are returned to their rightful owner." *Id.* at 23a. Under those circumstances, the plurality concluded "that ordering a convicted defendant to return ill-gotten gains" should not be construed "as increasing the sentence authorized by a conviction pursuant to *Booker*." *Ibid.*

Judge Sloviter concurred in the judgment on the restitution issue, stating that while "Judge McKee's dissent has much to commend it," the lead opinion "persuades me that restitution is not a punishment governed by the Sixth Amendment." Pet. App. 25a. Judge Fisher, joined by Judge Barry, also concurred in the judgment, concluding that "restitution is not the type of criminal penalty to which the right to a jury trial attaches." *Id.* at 26a. Judges Fisher and Barry would not have reached the issue of whether restitution orders "constitute an increase in punishment beyond the 'statutory maximum' for the offense." *Ibid.*

Five judges dissented from the majority's restitution holding in an opinion by Judge McKee. Pet. App. 27a-46a. Citing *Pasquantino* v. *United States*, 544 U.S. 349 (2005), the dissenting judges believed that the plurality opinion erred in focusing on restitution as a "restorative remedy" for victims of crimes. Pet. App. 33a (quoting *id.* at 23a). Moreover, in the dissent's view, the plurality opinion was in tension with *Blakely* v. *Washington*, 542 U.S. 296 (2004), because "restitution cannot be ordered on the basis of the jury's verdict *alone*," without additional factfinding by the district court judge as to the amount of loss. Pet. App. 35a. The dissenters believed that "[r]estitution in any amount greater than zero clearly increases the punishment that could otherwise be

imposed." *Id.* at 37a. While the dissenters acknowledged "that the precise issue of the application of the Sixth Amendment to restitution orders was not before the Court in *Apprendi* [v. *New Jersey*, 530 U.S. 466 (2000)] or its progeny," they declined "to rationalize a distinction between punishment in the form of incarceration on the one hand, and punishment in the form of restitution on the other." *Id.* at 45a.

While Judge Ambro joined Judge McKee's dissent, he wrote separately to note his view "that both the majority and dissenting opinions are grounded in reasonable interpretations of *Booker*'s effect on restitution." Pet. App. 47a. Judge Smith also joined Judge McKee's dissent, adding that, in his view, the majority's ruling "renders the right to a jury trial considerably less intelligible." *Id.* at 50a.

ARGUMENT

1. a. Petitioners contend (Dantone Pet. 13-15; Leahy Pet. 17-20) that this Court should grant review to define the intent required under the bank fraud statute. Although there is some disagreement in the courts of appeals on that issue, the court of appeals' decision in this case is correct, and this case does not involve the factual pattern that has generally presented the disagreement. Accordingly, further review is not warranted.

(i) The bank fraud statute makes it a crime "knowingly [to] execute[], or attempt[] to execute, a scheme or artifice--(1) to defraud a financial institution; or (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. 1344. The statute thus prohibits "any 'scheme or

artifice to defraud a financial institution' or to obtain any property of a financial institution 'by false or fraudulent pretenses, representations, or promises.'" *Neder* v. *United States*, 527 U.S. 1, 21 (1999). Congress intended the statute, like the mail and wire fraud statutes, to have a broad scope. See S. Rep. No. 225, 98th Cong., 1st Sess. 378 (1983) (noting that the bank fraud statute was "modeled" on the mail and wire fraud statutes, "which have been construed by the courts to reach a wide range of fraudulent activity"). Section 1344 has thus been construed to encompass a variety of fraudulent schemes that undermine the integrity of the banking system. See, *e.g.*, *United States* v. *Brandon*, 17 F.3d 409, 426 (1st Cir.), cert. denied, 513 U.S. 820 (1994); *United States* v. *Rackley*, 986 F.2d 1357, 1361 (10th Cir.), cert. denied, 510 U.S. 860 (1993).

This Court has not defined the intent that a defendant must possess in order to violate the bank fraud statute. Nevertheless, the Court's interpretation of the analogous mail fraud statute makes clear that the essence of a bank fraud scheme is "the deprivation of something of value by trick, deceit, chicane or overreaching." *McNally* v. *United States*, 483 U.S. 350, 358 (1987) (quoting *Hammerschmidt* v. *United States*, 265 U.S. 182, 188 (1924)). For that reason, several courts of appeals have held that the intent necessary for a defendant to be convicted of bank fraud "is an intent to deceive the bank in order to obtain from it money or other property." *United States* v. *Kenrick*, 221 F.3d 19, 26-27 (1st Cir.) (en banc), cert. denied, 531 U.S. 961 and 1042 (2000). See *United States* v. *McCauley*, 253 F.3d 815, 819 (5th Cir. 2001) ("The requisite intent to defraud is established if the defendant acted knowingly and with the specific intent to deceive, ordinarily for the purpose

of causing some financial loss to another or bringing about some financial gain to himself.") (citation omitted); *United States* v. *Lamarre*, 248 F.3d 642, 649 (7th Cir.) ("'[s]pecific intent to defraud' means that a defendant acted willfully and with specific intent to deceive or cheat"), cert. denied, 533 U.S. 963 (2001); *United States* v. *Goldblatt*, 813 F.2d 619, 624 (3d Cir. 1987) ("[t]he bank fraud statute condemns schemes designed to deceive in order to obtain something of value").

(ii) As petitioners note (Dantone Pet. 13-15; Leahy Pet. 17-19), there is some disagreement among the courts of appeals concerning the intent necessary to constitute bank fraud in certain circumstances. The disagreement concerns whether, in order to establish that the defendant possessed the requisite intent to defraud, the government must prove that the defendant exposed, or intended to expose, a bank to the risk of financial loss. The First, Sixth, Ninth, Tenth, and Eleventh Circuits have rejected such a requirement. See *United States* v. *McNeil*, 320 F.3d 1034, 1037-1039 (9th Cir.) (rejecting the contention that Congress intended to limit the reach of the bank fraud statute to cases in which the bank is put at a risk of loss), cert. denied, 540 U.S. 842 (2003); *United States* v. *Everett*, 270 F.3d 986, 991 (6th Cir. 2001) ("to have the specific intent required for bank fraud the defendant need not have put the bank at risk of loss in the usual sense or intended to do so"), cert. denied, 537 U.S. 828 (2002); *United States* v. *De La Mata*, 266 F.3d 1275, 1298 (11th Cir. 2001) ("we believe that 'risk of loss' is merely one way of establishing intent to defraud in bank cases"), cert. denied, 535 U.S. 989 (2002); *Kenrick*, 221 F.3d at 29 (intent to harm bank is not required); *United States* v. *Sapp*, 53 F.3d 1100, 1103 (10th Cir. 1995) ("government need not prove that a de-

fendant put a bank 'at risk' to sustain a conviction under section 1344(2)"), cert. denied, 516 U.S. 1082 (1996). In contrast, the Second, Fifth, and Seventh Circuits have held that the government must prove, as an element of the offense, either that the defendant intended to expose the bank to an actual or potential loss, *United States* v. *Laljie*, 184 F.3d 180, 189 (2d Cir. 1999); *United States* v. *Rodriguez*, 140 F.3d 163, 168 (2d Cir. 1998), or that the defendant placed the bank at risk of civil liability, *United States* v. *Odiodio*, 244 F.3d 398, 401 (5th Cir. 2001); *United States* v. *Sprick*, 233 F.3d 845, 852 (5th Cir. 2000); *United States* v. *Davis*, 989 F.2d 244, 246-247 (7th Cir. 1993). The Fourth Circuit has likewise stated that "expos[ing]" a bank "to an actual or potential risk of loss" is a required element of bank fraud. *United States* v. *Brandon*, 298 F.3d 307, 312 (4th Cir. 2002) (quoting *United States* v. *Colton*, 231 F.3d 890, 908 (4th Cir. 2000)). See *United States* v. *Staples*, 435 F.3d 860, 867 (8th Cir. 2006) (observing that with respect to Section 1344(2), but not Section 1344(1), the Eighth Circuit requires a loss, or attempt to cause a loss, to a financial institution).[7]

(iii) The present case, however, does not warrant this Court's review, for two reasons. First, the decision below is correct to the extent it holds that "loss, or risk of loss * * * need not be intended to satisfy § 1344's mens rea requirement of a specific intent to defraud a bank." Pet. App. 71a. Nothing in the text of the statute suggests that exposing the bank to the risk of loss is a component of the offense. 18 U.S.C. 1344. On the con-

[7] The Third Circuit requires an intent to harm in situations, unlike this one, where the bank is an "unwitting instrumentality" in the fraud, see Pet. App. 71a, and it requires that the fraudulent scheme "expose[] the bank to some type of loss." *Id.* at 94a.

trary, "[a]ll the statute facially seems to require in a case involving property in the custody or control of a bank, is that there be an attempt to obtain such property from the bank by deceptive means." *McNeil*, 320 F.3d at 1037.

As this Court has noted, the statute does not "define[] the phrase 'scheme or artifice to defraud.'" *Neder*, 527 U.S. at 20. But, assuming, as the Court did in *Neder*, *id.* at 21-23, that Congress used the phrase in accordance with its common-law meaning, the intent element of common-law fraud entails only the "intention to induce the plaintiff to act or refrain from action in reliance upon the misrepresentation." W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* (*Prosser*) § 105, at 728 (5th ed. 1984). See Restatement (Second) of Torts § 525 ("One who fraudulently makes a representation * * * for the purpose of inducing another to act or to refrain from action in reliance upon it, is subject to liability to the other in deceit."); *Kenrick*, 221 F.3d at 28. "[C]ommon-law fraud has no additional 'intent to harm' requirement." *Kenrick*, 221 F.3d at 28 (citing *Prosser* § 107, at 741, and 2 Charles G. Addison, *A Treatise on the Law of Torts* § 1174, at 404 (H.G. Wood ed., 1881)). Thus, the intent element of common-law fraud provides no basis for a requirement that the government prove that the defendant intended to, or did, expose the bank to a risk of loss. Nor can that requirement be drawn from the reliance or damages elements of common-law fraud, because, as this Court has explained, those elements "plainly have no place in the federal fraud statutes," which prohibit not completed fraud but rather a "scheme to defraud." *Neder*, 527 U.S. at 25.

Furthermore, nothing in the purposes of the bank fraud statute warrants departing from its text by confin-

ing its scope to cases in which the bank is exposed to the risk of loss. Congress sought to "assure effective prosecution of the range of fraudulent crimes commonly committed today against federally controlled or insured financial institutions" and thereby to "assure the integrity of the Federal banking system." S. Rep. No. 225, 98th Cong., 1st Sess. 379 (1983). Congress intended that the bank fraud statute would be construed "to reach a wide range of fraudulent activity" and to fill gaps left by existing federal criminal laws. *Id.* at 378; see *id.* at 377. Congress could reasonably conclude, as the text of the bank fraud statute indicates, that ensuring the integrity of federally insured and controlled financial institutions requires criminalizing all attempts to use deception to obtain assets within their custody or control, whether or not the government is able to prove, in a particular case, that the attempt has exposed, or was intended to expose, the bank to a potential loss. See *McNeil*, 320 F.3d at 1038-1039.

Second, virtually all of the cases in which courts have reversed convictions for lack of an instruction on, or proof of, a risk of loss to, or an intent to harm, the bank have involved situations where the bank was merely an "unwitting instrumentality" in the fraud. *United States* v. *Khorozian*, 333 F.3d 498, 505 (3d Cir.) (quoting *United States* v. *Thomas*, 315 F.3d 190, 201 (3d Cir. 2002)), cert denied, 540 U.S. 968 (2003); see *De La Mata*, 266 F.3d at 1298. For example, in *Thomas*, the defendant used accounts at the banks to fraudulently transfer funds out of a bank customer's accounts. See 315 F.3d at 194.[8] That type of factual scenario is not presented

[8] The same is true in *Staples*, 435 F.3d at 867; *Odiodio*, 244 F.3d at 400; *Sprick*, 233 F.3d at 849-851; *Laljie*, 184 F.3d at 183-186; *Rodriguez*,

here. Indeed, the court of appeals expressly distinguished the situation in *Thomas* from this one on the ground that "the banks here were the direct targets of the misrepresentations and the fraudulent scheme." Pet. App. 74a. As the court explained, petitioners "misrepresented to the banks that they would auction the cars at the highest price; they diverted the cars to Carriage Trade's inventory despite their promises to the contrary; they prepared false bills of sale that were sent to the banks; and they occasionally overstated the extent of the physical damage of the cars to the banks in an effort to justify the low prices." *Ibid.*

In the court of appeals, petitioners sought to portray this case as one in which the bank's *customers*, rather than the bank, could be viewed as the victims of the fraud. Pet. App. 103a. But the court of appeals rejected that contention, concluding that this is a case in which "the bank is the direct target of the deceptive conduct." *Id.* at 104a. The court also rejected petitioners' argument that the government argued in closing that "the primary victim[s] of the fraudulent scheme to defraud

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140 F.3d at 165-166; and *Davis*, 989 F.2d at 246. But see *United States* v. *Schnitzer*, 145 F.3d 721, 734-736 (5th Cir. 1998) (affirming judgment of acquittal on bank fraud charges with respect to defendant bank directors on the ground that there was insufficient evidence of "intent to injure" and "risk of loss" with respect to value-for-value real estate transaction). Although no other court of appeals has expressly adopted the Third Circuit's approach of applying the "requirement of an intent to cause loss or liability to the bank" only in situations "where the bank was merely an 'unwitting instrumentality,'" Pet. App. 71a, that fact pattern represents the typical situation in which an instruction on risk of loss or harm might matter. That is because, when the bank is the direct target, misrepresentations or schemes designed to obtain funds from the bank will virtually automatically expose the bank to a risk of loss.

were the debtors as opposed to the banks." *Id.* at 104a n.21. The court explained that any such suggestion was "belied by the extensive record in this case, which contains many examples of the Government's theory that the banks were the targets of the scheme." *Id.* at 105a n.21[9] Any disagreement that petitioners raise with the court of appeals' resolution of that issue is fact bound and does not warrant review. Because this case does not involve the factual scenario that has generally given rise to concerns about the absence of a risk of harm or loss instruction in order to commit bank fraud, it is not an appropriate vehicle for addressing the issue.[10]

b. Petitioners further contend (Dantone Pet. 19-20; Leahy Pet. 6-14) that there is a conflict among the courts of appeals on whether jury instructions defining bank fraud may reference a standard of "moral upright-

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[9] Pet. App. 105a n.21 ("As just one example, in its closing argument, the Government clearly argued that the banks were the intended targets of the deception and the injured party: 'this is a very simple scheme. The defendants sent the banks false bills of sale, phony documents. They lied to the banks when they said that their [the banks'] cars had been sold at auction. They dummied up the paperwork to fake the sales, and then they sent the bank a check for the low phony purchase price.'") (quoting C.A. App. 3042a); see, *e.g.*, C.A. App. 3059a-3060a ("So you have to determine whether or not * * * the defendants executed a scheme to defraud these banks or to obtain the money of the banks, and that they did this with the intent to defraud, that is with the intent to get things that they were not entitled to, that is the auction proceeds that the banks were due on each and every one of these 311 cars.") (Gov't closing argument).

[10] The only risk-of-harm-or-loss issue raised by the petitions deals with the jury instructions. The court of appeals found the evidence sufficient to establish that the defendants "exposed the bank to some type of loss," Pet. App. 94a, and petitioners do not appear to challenge that holding. In light of the strength of the evidence, any instructional error was harmless. *Neder*, *supra*.

ness." Yet neither petitioner fully explains how, in the context of the district court's lengthy bank fraud instruction, the single reference to "a departure from moral uprightness" as a "measure of a fraud" (C.A. App. 77a) renders the issue appropriate for review in the present case. Leahy suggests (Leahy Pet. 8-9) that, in the mail fraud context, the "moral uprightness" formulation conflicts with this Court's decisions and no longer has utility. Dantone maintains that the district court's use of that phrase constituted a "dangerous expansion of criminal liability under the federal fraud statutes." Dantone Pet. 20.

There is no need to review this issue here. Both the majority and the dissenting panel opinions suggest that the "moral uprightness" language is problematic. The majority expressed its "concerns" with the use of "elastic formulations of morality and fairness" in bank fraud cases, but declined to "look at the challenged instruction in isolation, as the Defendants do." Pet. App. 80a. Rather, the majority found that when the instructions were "taken as a whole," the jury could not have convicted petitioners "merely for failing to adhere to standards of moral uprightness or fundamental honesty." *Ibid.* In dissent, Judge Becker agreed that the panel majority "rightly acknowledges the dangers inherent in using the standard of 'moral uprightness and fairness' to define fraud in a jury instruction." *Id.* at 120a. He likewise agreed that the court of appeals should "not look to portions of the instructions in isolation, and must consider them in their totality." *Id.* at 121a. Unlike the majority, however, Judge Becker found the "moral uprightness" language to be "central to the definition of fraud in the jury instructions in this case" and thus not harmless error. *Id.* at 122a.

Given the concern expressed by both the majority and dissenting opinions with respect to the inclusion of notions of "moral uprightness," the use of that instruction in the Third Circuit will likely wane. If it does so, that would bring the Third Circuit in line with the majority of other circuits that have considered "moral uprightness" instructions in fraud cases. See Dantone Pet. 20; Leahy Pet. 9-12. Indeed, other than the decision below, petitioners cite only cases from the Sixth Circuit as supporting a "moral uprightness" instruction. Dantone Pet. 20; Leahy Pet. 9-10. The most recent of those cases was decided nearly a decade ago, and dealt with a wire fraud instruction. *United States* v. *Frost*, 125 F.3d 346, 371-372 (6th Cir. 1997), cert. denied, 525 U.S. 810 (1998). Just as in the present case, the court of appeals in *Frost* upheld the fraud convictions when it considered the fraud instructions as a whole: "The disputed language, however, occurred in the context of the detailed instructions quoted above, which, as a whole, provided that the jury could not convict defendants merely for not having acted according to fundamental honesty or moral uprightness." *Id.* at 372.

Thus, the alleged conflict is, at most, of diminishing importance. The majority opinion correctly construed the instructions as a whole, see *Jones* v. *United States*, 527 U.S. 373, 391 (1999), to eliminate the possibility that the jury could have found petitioner guilty "merely for failing to adhere to standards of moral uprightness or fundamental honesty." Pet. App. 80a. And the disagreement between the panel majority and the dissent as to whether the particular instructions in the present case sufficiently ameliorated any concern regarding the "moral uprightness" language used here is a case-specific issue not warranting this Court's review.

c. The court of appeals unanimously rejected petitioners' contention that they were entitled to an instruction that they could not be found guilty of bank fraud if they were found to have acted in subjective good faith. Pet. App. 81a-82a; *id.* at 109a (Becker, J., concurring in part and dissenting in part). The court of appeals noted that it followed the majority rule among the circuits "that a district court does not abuse its discretion in denying a good faith instruction where the instructions already contain a specific statement of the government's burden to prove the elements of a 'knowledge' crime." *Id.* at 82a. The court of appeals added that in the present case, the district court's instructions, "taken as a whole, adequately defined the elements of the crime, including the intent requirement, thereby making a good faith instruction unnecessary and redundant." *Ibid.*

While acknowledging that the Third Circuit's holding is in accord with the vast majority of the courts of appeals, petitioner Leahy cursorily suggests that the Court should review the issue in the present case, because the Sixth and Tenth Circuits have taken a minority position. See Leahy Pet. 14-15 (comparing *United States* v. *Lung Fong Chen*, 393 F.3d 139, 151-154 (2d Cir. 2004), cert. denied, 126 S. Ct. 226 and 372 (2005); *United States* v. *Mutuc*, 349 F.3d 930, 934 (7th Cir. 2003); *United States* v. *Walker*, 26 F.3d 108, 109-110 (11th Cir. 1994) (per curiam); *United States* v. *Gross*, 961 F.2d 1097, 1102-1103 (3d Cir.), cert. denied, 506 U.S. 965 (1992); *United States* v. *Dockray*, 943 F.2d 152, 155 (1st Cir. 1991); *United States* v. *Fowler*, 932 F.2d 306, 317 (4th Cir. 1991); *United States* v. *Ribaste*, 905 F.2d 1140, 1143 (8th Cir. 1990); *United States* v. *Dorotich*, 900 F.2d 192, 193-194 (9th Cir. 1990); *United States* v. *Chenault*, 844 F.2d 1124, 1130 (5th Cir. 1988), with

United States v. *Platte*, 401 F.3d 1176, 1184 (10th Cir. 2005); *United States* v. *Wall*, 130 F.3d 739, 746 (6th Cir. 1997)). Petitioner Leahy, however, offers no reason why the majority rule is wrong, nor could he. A separate instruction on good faith is not required where the trial court correctly instructs on the intent required for a charged offense. See *United States* v. *Pomponio*, 429 U.S. 10, 13 (1976) (per curiam) (because "[t]he trial judge * * * adequately instructed the jury on willfulness[,] [a]n additional instruction on good faith was unnecessary"); *Cheek* v. *United States*, 498 U.S. 192, 201 (1991).

Nor has petitioner Leahy made an effort to explain why, if he were in the Sixth Circuit, the district court's failure to give his requested good faith instruction would not have been harmless, given the totality of the bank fraud instructions. See, *e.g.*, *United States* v. *McGuire*, 744 F.2d 1197, 1201-1202 (6th Cir. 1984) (holding failure to give "good faith" instruction harmless error in light of the specific intent instructions), cert. denied, 471 U.S. 1004 (1985). Although the Tenth Circuit's rule is erroneous, it has acknowledged that it is "an outlier on this issue," *Platte*, 401 F.3d at 1184, and it may reconsider its position. There is thus no need for this Court to resolve the differences in approach between the court of appeals in this case and the Tenth Circuit. Indeed, this Court has repeatedly denied review on this issue, and there is no reason for a different result here. See *Simkanin* v. *United States*, 126 S. Ct. 1911 (2006); *Lewis* v. *United States*, 534 U.S. 814 (2001); *Bates* v. *United States*, 520 U.S. 1253 (1997); *Von Hoff* v. *United States*,

520 U.S. 1253 (1997); *Gross* v. *United States*, 506 U.S. 965 (1992); *Green* v. *United States*, 474 U.S. 925 (1985).[11]

2. Petitioners further contend (Dantone Pet. 21-24; Leahy Pet. 20-21) that the district court's order of criminal forfeiture, as affirmed by the court of appeals sitting en banc, conflicts with this Court's decision in *Booker* and its antecedents. According to petitioners, the district court violated their Sixth Amendment right to a jury trial by determining the amount that they were required to forfeit. That contention lacks merit.

Federal Rule of Criminal Procedure 32.2(b)(4) provides that, "[u]pon a party's request in a case in which a jury returns a verdict of guilty, the jury must determine whether the government has established the requisite nexus between the property and the offense committed by the defendant." This Court has squarely held, however, that "the right to a jury verdict on forfeitability does not fall within the Sixth Amendment's constitutional protection." *Libretti* v. *United States*, 516 U.S. 29, 49 (1995). The Court in *Libretti* explained that a criminal forfeiture order is properly regarded as "an aspect of sentencing," and the Court relied on its prior decisions holding that "a defendant does not enjoy a constitutional right to a jury determination as to the appropriate sentence to be imposed." *Ibid.*

In *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), this Court held, as a matter of federal constitutional law, that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490.

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[11] A substantially similar issue is also presented in the pending certiorari petition in *Green* v. *United States*, No. 06-5392 (filed July 13, 2006).

Several courts of appeals have considered whether the rule announced in *Apprendi* and subsequently extended in *Blakely* v. *Washington*, 542 U.S. 296 (2004), and in *United States* v. *Booker*, 543 U.S. 220 (2005), casts doubt on *Libretti*'s conclusion that there is no Sixth Amendment right to trial by jury on questions of criminal forfeiture. Every court of appeals to address the question has held that *Apprendi*, *Blakely*, and *Booker* do not cast doubt on *Libretti*'s application of Sixth Amendment principles to the forfeiture context. See, *e.g.*, *United States* v. *Hall*, 411 F.3d 651, 654-655 (6th Cir. 2005); *United States* v. *Fruchter*, 411 F.3d 377, 382-383 (2d Cir.), cert. denied, 126 S. Ct. 840 (2005); *United States* v. *Tedder*, 403 F.3d 836, 841 (7th Cir.), cert. denied, 126 S. Ct. 827 (2005); *United States* v. *Shryock*, 342 F.3d 948, 991 (9th Cir. 2003), cert. denied, 541 U.S. 965 (2004); *United States* v. *Keene*, 341 F.3d 78, 85-86 (1st Cir. 2003); *United States* v. *Gasanova*, 332 F.3d 297, 301 (5th Cir.), cert. denied, 540 U.S. 1011 (2003); *United States* v. *Najjar*, 300 F.3d 466, 485-486 (4th Cir.), cert. denied, 537 U.S. 1094 (2002); *United States* v. *Cabeza*, 258 F.3d 1256, 1257 (11th Cir. 2001) (per curiam); *United States* v. *Corrado*, 227 F.3d 543, 550 (6th Cir. 2000). Moreover, in *Booker*, this Court identified 18 U.S.C. 3554, which authorizes the sentencing court in specified categories of prosecutions to impose an order of criminal forfeiture, as a provision of the Sentencing Reform Act of 1984 that remains "perfectly valid." 543 U.S. at 258.

In this case, both the majority and dissenting opinions of the en banc court acknowledged that *Libretti* is dispositive of the forfeiture issue raised by petitioners. Pet. App. 10a ("*Libretti* thus flatly holds that the Sixth Amendment is not implicated in the forfeiture context.")

(lead opinion of Judge Fuentes); *id.* at 27a ("Given the Supreme Court's holding in *Libretti* * * * , I agree that a judicial determination of the amount of forfeiture when imposing a criminal sentence does not violate the Sixth Amendment right to a jury trial.") (lead dissent of Judge McKee). Despite petitioners' claims (Dantone Pet. 21; see Leahy Pet. 20-21), there is no reason for this Court to revisit its holding in *Libretti*. As the Second Circuit has explained, "*Blakely* and *Booker* address determinate sentencing regimes." *Fruchter*, 411 F.3d at 383 (citing *Blakely*, 542 U.S. at 308; *id.* at 323-324 (O'Connor, J., dissenting); *Booker*, 543 U.S. at 233). By its terms, the rule announced in *Apprendi* applies only to a factual determination that "increases the penalty for a crime beyond the prescribed statutory maximum." 530 U.S. at 490. The amount of money or other property that a federal criminal defendant may be required to forfeit is not subject to any such statutory maximum. Consequently, the holdings of *Apprendi*, *Blakely*, and *Booker* are inapplicable here, because "[a] judge cannot exceed his constitutional authority by imposing a punishment beyond the statutory maximum if there is no statutory maximum. Criminal forfeiture is, simply put, a different animal from determinate sentencing." *Fruchter*, 411 F.3d at 383; see *Hall*, 411 F.3d at 655 ("The absence of a statutory maximum or any sort of guidelines system indicates that forfeiture amounts to a form of indeterminate sentencing, which has never presented a Sixth Amendment problem.").

3. Finally, petitioners contend (Dantone Pet. 25-30; Leahy Pet. 22-23) that the district court's order of restitution conflicts with the *Apprendi*, *Blakely*, and *Booker* line of cases. That argument does not warrant further review.

The MVRA requires that a district court, as part of the sentence for specified offenses, "order restitution * * * in the full amount of each victim's losses," 18 U.S.C. 3664(f)(1)(A), for any "offense against property * * * in which an identifiable victim or victims has suffered a * * * pecuniary loss." 18 U.S.C. 3663A(c)(1)(A)(ii) and (B). By making restitution mandatory, the MVRA amended the previously applicable restitution scheme, set forth in the VWPA, 18 U.S.C. 3663, pursuant to which a district judge had discretion to order restitution in an amount commensurate with a defendant's ability to pay. As this Court noted in the wire fraud context, whether or not restitution is mandatory, the fraud statutes advance the government's "interest in punishing fraudulent domestic criminal conduct," and an award of restitution in such a case serves "to mete out appropriate criminal punishment for that conduct." *Pasquantino* v. *United States*, 544 U.S. 349, 365 (2005).

As the weight of authority holds, the *Apprendi* line of cases does not apply to restitution, any more than it applies to forfeiture. Under *Apprendi* and *Blakely*, a judge cannot enhance a sentence above a prescribed statutory maximum unless the factual basis for that enhancement was established by the jury's verdict or admitted by the defendant. As with criminal forfeiture, however, there is no prescribed statutory maximum for restitution that is enhanced on the basis of judicial factfinding. Rather, the maximum amount of restitution is "the full amount of each victim's losses as determined by the court." 18 U.S.C. 3664(f)(1)(A). For that reason, the plurality opinion correctly viewed petitioners' jury convictions "as authorizing restitution of a specific sum, namely the 'full amount of each victim's loss.'" Pet. App.

21a. Moreover, as both the plurality opinion and the concurring judges recognized, restitution is not punishment to which the Sixth Amendment applies, as it has "little in common with the prison sentences challenged by the defendants in *Jones*, *Apprendi*, *Blakely*, and *Booker*." *Id.* at 23a; see *id.* at 25a (Sloviter, J., concurring in judgment); *id.* at 26a (Fisher, J., joined by Barry, concurring in part in the judgment).[12]

As petitioners acknowledge (Dantone Pet. 28; Leahy Pet. 22 n.16), the decision below reflects "the unanimous view of the other courts of appeal[s] that restitution may be awarded without jury findings beyond a reasonable doubt." Pet. App. 22a & n.12; see, *e.g.*, *United States* v. *Garza*, 429 F.3d 165, 169-170 (5th Cir. 2005) (per curiam), cert. denied, 126 S. Ct. 1444 (2006); *United States* v. *Visinaiz*, 428 F.3d 1300, 1316 (10th Cir. 2005), cert. denied, 126 S. Ct. 1101 (2006); *United States* v. *Sosebee*, 419 F.3d 451, 461 (6th Cir.); cert. denied, 126 S. Ct. 843 (2005); *United States* v. *Bussell*, 414 F.3d 1048, 1060 (9th Cir. 2005); *United States* v. *May*, 413 F.3d 841, 849 (8th Cir.), cert. denied, 126 S. Ct. 672 (2005); *United States* v. *George*, 403 F.3d 470, 473 (7th Cir.), cert. denied, 126 S. Ct. 636 (2005). Although peti-

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[12] The dissenting judges below (Pet. App. 31a-35a) expressed the view that this Court's decision in *Pasquantino*, which referred to the purpose of restitution as "to mete out appropriate criminal punishment" (544 U.S. at 365), fundamentally altered the unanimous view that the *Apprendi* line of cases is not applicable to restitution. *Pasquantino* did not so hold, however, nor has any court of appeals construed *Pasquantino* in that manner. Indeed, the plurality opinion below considered *Pasquantino* at some length (Pet. App. 13a-17a) and correctly concluded that the case did not establish a Sixth Amendment bar to district judges "determining the sum of restitution" that criminal defendants must pay after a jury has found them guilty beyond a reasonable doubt. *Id.* at 17a.

tioners correctly note that the courts of appeals take "divergent routes to the conclusion that restitution falls outside Sixth Amendment bounds" (Dantone Pet. 29), the fact that those courts reach the same destination leaves no conflict warranting this Court's review.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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